(9)

No. 99-1408

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

In The
Supreme Court of the United States

GAIL ATWATER, Individually, and MICHAEL HAAS as next friend of ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS,

Petitioners,

v.

CITY OF LAGO VISTA, BART TUREK and FRANK MILLER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE INSTITUTE ON CRIMINAL JUSTICE AT THE UNIVERSITY OF MINNESOTA LAW SCHOOL AND ELEVEN LEADING EXPERTS ON LAW ENFORCEMENT AND CORRECTIONS ADMINISTRATION AND POLICY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

RICHARD S. FRASE
Counsel of Record
229 19th Avenue South
Minneapolis, Minnesota 55455
(612) 625-0831
Attorney for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

4500

TABLE OF CONTENTS

Page

Table of Authorities iv

Statement of Interest of Amici 1

Summary of Argument 2

Argument 3

I. A Balancing of the Interests Involved Shows That a Custodial Arrest for a Non-Jailable Misdemeanor Offense Is Unreasonable 3

A. An Individual's Interest in Avoiding the Trauma, Risks, and Consequences That Result from a Custodial Arrest Is Very Strong 3

1. The Arrest and Booking Process Includes Many Administrative Tasks That Are Psychologically Threatening and Embarrassing to the Accused 4

2. Temporary Detention Carries Many Physical Risks, Including Risk of Assault, Exposure to Infectious Diseases, and a Heightened Risk of Suicide 6

B. In Most Cases There Is No Legitimate Law Enforcement Interest in Making a Custodial Arrest for a Non-Jailable Misdemeanor Offense 9

C. Not Only Does Arresting an Individual for a Non-Jailable Misdemeanor Offense Typically Serve No Legitimate Law Enforcement Purpose, Such an Arrest Actually Contradicts Government Interests 11

TABLE OF CONTENTS – Continued

Page

1. Custodial Arrests of Non-Jailable Misdemeanants Present Serious Management Problems for Jail Officials and Produce Bottlenecks in the Booking Areas of Jails, Which Are Costly, Dangerous, and Staff-Intensive 12

2. Custodial Arrests in Non-Jailable Misdemeanor Cases Burden Courts, Magistrates, and Pre-Trial Release Programs 14

3. Arresting An Individual for a Fine-Only Traffic Offense Is Contrary to Law Enforcement Interests Because It Removes an Officer from His or Her Duty Station and Negatively Affects the Public's Perception of the Police 15

4. When a Custodial Arrest Results in Significant and Avoidable Problems for the Government, the Government's Interest in Making the Arrest Is Severely Weakened..... 17

II. A Custodial Arrest for a Non-Jailable Misdemeanor Offense Violates the Proportionality Principle of the Fourth Amendment..... 17

III. Model Standards Promulgated by Prominent National Entities Require Police Officers to Issue Citations in Lieu of Arrest for All Misdemeanor Offenses Absent Exceptional Circumstances ... 21

TABLE OF CONTENTS – Continued

Page

IV. Amici Urge This Court to Adopt a Rule Barring Custodial Arrest Absent Exceptional Circumstances in All Non-Jailable Misdemeanor Cases, in Keeping With the Model Standards, Workable Laws in Many States, and Good Police Practice 27

CONCLUSION 30

Appendix A: Information about Amici Appendix-1

TABLE OF AUTHORITIES

Page

CASES

Carroll v. United States, 267 U.S. 132 (1925) 18

Graham v. Connor, 490 U.S. 386 (1989) 20

McDonald v. United States, 335 U.S. 451 (1948) 19

Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990) 9

New York v. Burger, 482 U.S. 691 (1987) 10

Pennsylvania v. Mimms, 434 U.S. 106 (1977) 10

Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) 9

South Dakota v. Opperman, 428 U.S. 364 (1976) 9

State v. Bauman, 586 N.W.2d 416 (Minn. Ct. App. 1998) 29

State v. Martin, 253 N.W.2d 404 (Minn. 1977) 29

State v. Varnado, 582 N.W.2d 886 (Minn. 1998) 29

Tennessee v. Garner, 471 U.S. 1 (1985) 19, 20

United States v. Hensley, 469 U.S. 221 (1985) 20

United States v. Robinson, 414 U.S. 218 (1973) 9

Welsh v. Wisconsin, 466 U.S. 740 (1984) 18, 19, 20

STATUTES AND RULES

Alaska Stat. § 12.25.180(b) (1999) 29

Ind. Code § 9-30-2-5 (2000) 29

Minn.R.Crim.P., Rule 6.01, subd. 1 (1999) 28, 29

TABLE OF AUTHORITIES – Continued

Page

Minn.R.Crim.P., Rule 6.01, subd. 2 (1999) 29

Neb. Rev. Stat. § 60-684 (1999) 29

N.M. Stat. Ann. § 66-8-123 (2000) 29

North Carolina Highway Patrol Policy Manual, Directive 1.1., Sections III.A, III.B (1999) 30

S.D. Codified Laws Ann. § 32-33-2 (2000) 29

Vt. R. Cr. P. 3(c) (1999) 29

OTHER AUTHORITIES

American Bar Association, *Standards for Criminal Justice*, Standards 10-2.1, 10-2.2 (2d ed., 1980) 22, 23, 24, 25

American Bar Association, *Standards Relating to Pretrial Release*, Standard 2.1 (1968) 22

American Law Institute, *Model Code of Pre-Arraignment Procedure*, Section 120.2(4) (1975) 25

Julie Cart, *As He Runs For 4th Term, Toughest Sheriff is Ever Inventive*, L.A. Times, Aug. 23, 2000, at A-5 5

Richard S. Frase, *Jails, in* Handbook of Crime & Punishment 493 (Michael Tonry ed., 1998) 12

Halsbury's Laws of England, vol. 9 18

L.M. Hayes & B. Kajdan, *And Darkness Closes In*, National Center on Institutions and Alternatives, Alexandria, Virginia, (1981) 8

L.M. Hayes, *National Study of Jail Suicides: Seven Years Later*, 60 Psychiatric Quarterly 7 (1989) 8

TABLE OF AUTHORITIES – Continued

Page

Patrick G. Jackson, *Competing Ideologies of Jail Confinement, in* American Jails: Public Policy Issues 30 (J.A. Thompson & G.L. Mays eds., 1991) 11

G. Larry Mays and Joel A. Thompson, *The Political and Organizational Context of American Jails, in* American Jails: Public Policy Issues 15 (J.A. Thompson & G.L. Mays eds., 1991) 13

James M. McMahon, *New York State Takes the Next Step in Saving Lives,* The Police Chief 34-39, July 2000 10

National Advisory Commission on Criminal Justice Standards and Goals, *Corrections,* Standard 4.3 (1973) 26

National Association of Pretrial Services Agencies, *Performance Standards and Goals for Pretrial Release and Diversion: Pretrial Release,* Standard II.A (1978) 26

National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Criminal Procedure,* Rules 211(c) (1)-(4) (1974) 25

National District Attorneys Association, *National Prosecution Standards,* Standards 10.2(B), 10.2(C)(2) (1977) 25

National Institute of Justice, *Alleviating Jail Crowding: A Systems Perspective* (1985) 14

National Institute of Justice, *Jailing Drunk Drivers: Impact on the Criminal Justice System,* Washington D.C. (1984) 13

National Sheriffs' Association, *Jail Classification and Discipline* (1988) 7, 8

TABLE OF AUTHORITIES – Continued

Page

Thomas Rosazza, *Jail Intake: Managing a Critical Function; Part One: Resources,* American Jails 108, Mar./Apr. 1999 6

Thomas Rosazza, *Jail Intake: Managing a Critical Function; Part Two: Intake Task Analysis,* American Jails 111, May/June, 1999 12

Joseph Rowan, *Suicide Prevention,* American Jails 24, Nov./Dec. 1994 7

Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses,* 62 Temple L. Rev. 221 (1989) 29

William Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations – Warrantless Entries into Premises: The Legacy of Welsh v. Wisconsin,* 38 U. Kan. L. Rev. 439 (1990) 20

Arthur Wallenstein, *Intake and Release in Evolving Jail Practice, in* Prison and Jail Administration: Practice and Theory 50 (Peter M. Carlson & Judith Simon eds., 1999) 7

Horace Wilgus, *Arrest Without a Warrant,* 22 Mich. L. Rev. 541 (1923-24) 18

L. Thomas Winfree, Jr., and John D. Wooldredge, *Exploring Suicides and Deaths by Natural Causes in America's Jails, in* American Jails: Public Policy Issues 64 (J. Thompson & G. Mays eds., 1991) 7, 8

STATEMENT OF INTEREST OF AMICI[1]

This brief is filed on behalf of the Institute on Criminal Justice at the University of Minnesota Law School and a group of interested individuals with relevant expertise.

The Institute on Criminal Justice ("ICJ") is part of the University of Minnesota Law School.[2] The Institute combines its work on issues of current concern to criminal justice practitioners and policymakers with the academic research interests of the faculty. Its major objective is to provide unbiased, practical information regarding emerging criminal justice issues to help guide policy decision making. The ICJ also provides technical assistance to government agencies on criminal justice matters, including jail practices and evaluation of court programs. The Institute's Executive Director, Janet Wiig, JD, MSW, is a former prosecutor; the Director of Research, Professor Richard S. Frase, has expertise in criminal law and procedure, jails, and sentencing. Recent ICJ projects have focused on issues such as jail overcrowding and comparative state sentencing practices. The ICJ is filing this brief to further its mission of providing unbiased, practical information, and because the issues raised by this case

---

[1] A list of the 11 individual amici who are filing this brief is set forth in the Appendix. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the amici curiae or counsel, have made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37 of the Rules of the Supreme Court, the parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court.

[2] The views of the Institute, expressed in this brief, do not necessarily reflect the views of the University of Minnesota.

have implications for the effective administration of justice in this country.

The remaining amici have joined this brief in their individual capacities; their biographical information (including present and former affiliations) is provided in Appendix A for identification and background purposes only. This group includes present and former jail administrators, criminal justice system practitioners, academic researchers with expertise on the administration of justice and law enforcement issues, and nationally-regarded experts on criminal law, jail operations, pretrial services, court administration, and police issues. Each of these individuals is widely known and highly respected in the law enforcement, corrections, and research communities. Every member of this group is committed to effective law enforcement policy and shares in the view that the arrest practice at issue in this case is contrary to law enforcement interests.

By virtue of their expertise and long-standing involvement with issues of jail management, law enforcement practices, court administration, and citation release, amici are uniquely equipped to provide the Court with information and policy perspectives that bear on the constitutional issues raised in this case. As a group, their goal is to ensure that law enforcement interests are addressed appropriately in this case, and that the Court is aware of how its ruling could impact the work of law enforcement officials around the country.

SUMMARY OF ARGUMENT

A full custodial arrest for a non-jailable misdemeanor is rarely necessary or justifiable. An individual has a substantial interest in avoiding the trauma and risks of a

custodial arrest; in most cases, no legitimate law enforcement purpose is served by such an arrest that would not be better served by the issuance of a citation; and unnecessary arrests are contrary to the interests of jail managers, court administrators, and even the police. Any balancing of the interests involved clearly favors the individual arrested. The same result is reached when such an arrest is examined under the proportionality standard of the Fourth Amendment.

Model standards promulgated by prominent national organizations such as the American Bar Association, the American Law Institute, the National District Attorneys Association, and the National Association of Pretrial Services Agencies, offer valuable guidance with respect to this issue. These standards all require the police to issue citations in lieu of arrest in all misdemeanor cases unless there are exceptional circumstances. The experience of several states and law enforcement agencies shows such standards to be workable and effective at meeting legitimate police needs.

Amici urge the Court to adopt a rule barring custodial arrest in all non-jailable misdemeanor cases absent exceptional circumstances.

ARGUMENT

I. A Balancing of the Interests Involved Shows That a Custodial Arrest for a Non-Jailable Misdemeanor Offense is Unreasonable

A. An Individual's Interest in Avoiding the Trauma, Risks, and Consequences That Result from a Custodial Arrest Is Very Strong

A clear understanding of what happens in the arrest and jailing process is critical in order to assess the

strength of an accused's interest in avoiding arrest. Persons who have not been through it can hardly imagine the full extent of the intrusiveness of an arrest. An arrest is nothing less than a frontal assault on the dignity, privacy, and safety of the accused. That trauma is magnified for an individual experiencing the criminal justice system for the first time.

1. The Arrest and Booking Process Includes Many Administrative Tasks That Are Psychologically Threatening and Embarrassing to the Accused

From the moment of arrest, an accused is subjected to intensive physical scrutiny and psychological pressures. Prior to placement in a patrol car, the individual will typically be subjected to a routine, suspicion-less search of her person, an action that, if properly done, involves extensive touching of her entire body, including the most private parts. This search may extend to any areas or objects within the arrestee's immediate control, the passenger compartment of any vehicle she occupied when arrested, and the contents of any clothing, purses, or other containers located therein.

An arrestee is then typically handcuffed behind her back and placed in the patrol car. This is a very public exercise, and may be witnessed by bystanders, neighbors, friends, and family.

At the police station or jail,[3] the accused typically is fingerprinted and photographed. Before being placed in a

---

[3] Depending on the jurisdiction, an arrested person may be taken to a police lockup, a municipal lockup, and/or a city, county, or regional jail. Therefore, the practice at issue in this case has implications for all such facilities. The word "jail" will be used in this brief to include police and municipal lockups.

cell, the arrestee will again be searched, including a pat-down of the genital areas and under and around a woman's breasts. An officer of the opposite sex may conduct the search. In some jails, the accused may be strip searched.

An officer will go through personal effects, including wallets and purses, for inventory purposes. A full-custody arrest also typically results in impounding the detainee's car if she was arrested while in a vehicle, which then permits routine, suspicion-less searches of every part of the car, including the trunk, and any containers therein.

In Phoenix, the accused is videotaped during the booking process through the Sheriff's web camera, so that anyone in the world with Internet access can view her under these trying circumstances.[4]

An individual requiring use of toilet facilities may need to use them in full view of many other inmates and staff. She may be made to shower in front of officers and other inmates. And she may be sprayed for lice.

Intake officers ask the detainee very specific questions on topics of personal hygiene, health, and mental health. Indeed, the better managed the jail, the more intrusive these questions will be because of the screening functions they serve.

---

[4] This website claims an average of 2.5 million viewers a day. *See* Julie Cart, *As He Runs For 4th Term, Toughest Sheriff is Ever Inventive*, L.A. Times, Aug. 23, 2000, at A-5. Although the Phoenix practice is not the norm, it involves the nation's fourth largest jail, and therefore affects a substantial number of detainees.

A pretrial services officer may telephone the accused's employers and associates to verify information relevant to pretrial release.

The individual has only limited access to telephones to make calls to secure her release or to arrange for the care of her children. Calls typically must be made within earshot of other detainees.

The arrest record may be permanent and can haunt the person for years to come, even if charges are dismissed or never filed. The very fact of arrest, or simply the time lost while involuntarily confined, can result in lost wages or even loss of a job.

These indignities, deprivations, and hardships make the arrest and booking process far more than a minor inconvenience. A custodial arrest constitutes a serious personal intrusion on an individual's liberty and dignity.

2. Temporary Detention Carries Many Physical Risks, Including Risk of Assault, Exposure to Infectious Diseases, and a Heightened Risk of Suicide

Corrections professionals agree that

> [n]o other criminal justice activity can claim the convergence of such potentially dangerous people or circumstances which are present at [jail] intake. Intake presents the most potential for injury to staff and prisoners because of the instability or uncertainty of the prisoners or the circumstances in which they find themselves.

Thomas Rosazza, *Jail Intake: Managing a Critical Function; Part One: Resources*, American Jails, Mar./Apr. 1999, at 108. Intake has been described as "the most critical area of a jail operation." *Id.* at p. 110.

During the booking process, individuals are often housed in group cells with many other detainees. Amici have personally seen as many as 40 arrestees in one cell. Because individuals have not yet been classified (separated by characteristics such as offense, risk, or health needs), someone who has been arrested for a petty offense can be confined with those accused of murder, rape, or other violent crimes, mentally unstable persons, and people with diseases such as tuberculosis, hepatitis, and AIDS. *See* Arthur Wallenstein, *Intake and Release in Evolving Jail Practice, in* Prison and Jail Administration: Practice and Theory 50 (Peter M. Carlson & Judith Simon eds., 1999). There is a real risk that an arrestee, even one charged with a minor offense, will be assaulted or exposed to infectious diseases.

Some physical and psychological conditions (including chemical dependency, anxiety, and depression) are likely to be seriously aggravated by incarceration. A handbook distributed to jail officials cautions booking officers to be "acutely aware that being arrested or incarcerated, especially for the first time, can be extremely traumatic for many persons." The National Sheriffs' Association, *Jail Classification and Discipline* 34 (1988).

The first 24 hours in jail are considered the most deadly. Many jail inmates arrive with an elevated suicide risk, which increases during the first hours of custody. L. Thomas Winfree, Jr., and John D. Wooldredge, *Exploring Suicides and Deaths by Natural Causes in America's Jails, in* American Jails: Public Policy Issues 64 (J. Thompson & G. Mays eds., 1991). Research shows that nearly 30 percent of all jail and lockup suicides occur within 3 hours of admission, and 50 percent of all jail and lockup suicides occur within the first 24 hours of intake. *See* Joseph

Rowan, *Suicide Prevention*, American Jails, Nov./Dec. 1994, at 24; The National Sheriffs' Association, *supra*, at 34 (citing L.M. Hayes & B. Kajdan, *And Darkness Closes In*, National Center on Institutions and Alternatives, Alexandria, Virginia, (1981)).[5] Furthermore, research suggests that the group most likely to commit suicide includes those inmates who are just "passing through," or short-term detainees. Winfree and Wooldredge, *supra*, at 77. A minor offender faced with incarceration may be exposed to a set of such terrifying and unfamiliar circumstances in jail booking that her risk of suicide is particularly elevated.

Amici note with concern that there are special risks associated with lockup facilities, such as the one involved in this case. *See supra* note 3. Police and municipal lockups tend to be essentially unregulated facilities, and, as such, they "fly under the radar screen" and may not adopt operations policies designed to ensure inmates' safety.[6] Lockups, especially those in police stations, are typically run by staff with little formal training in custodial issues. Many are minimally staffed, and thus inmates are inadequately supervised, or even unsupervised. Many of these facilities have poor lines of sight and inadequate safety procedures. As a result, the risks described above may be even greater in lockup facilities.

---

[5] In 1989, the national suicide rate in county jails was approximately 107 per 100,000 inmates, almost 10 times the rate in the general population. *See* L.M. Hayes, *National Study of Jail Suicides: Seven Years Later*, 60 Psychiatric Quarterly 7 (1989).

[6] Significantly, no major urban police department that runs its own lockup facilities has been accredited by the Commission on Accreditation for Law Enforcement Agencies (CALEA), due to poor conditions in these lockup facilities.

In sum, amici believe an individual's interest in avoiding the traumas, risks, and indignities that result from the arrest and booking processes is substantial, especially for those who are unfamiliar with the process.

B. In Most Cases, There Is No Legitimate Law Enforcement Interest in Making a Custodial Arrest for a Non-Jailable Misdemeanor Offense

Respondents have a legitimate law enforcement interest in ensuring that the state's seat belt laws are observed, and that violators pay the penalties authorized by the Legislature for these offenses. However, except in very unusual circumstances not present in this case, these law enforcement interests are fully served by issuing a citation. Thus, the police do not need, and should not be given, unlimited discretion to make custodial arrests for such offenses.[7]

---

[7] Respondents may seek to justify such unnecessary custodial arrests by citing recent decisions of this Court, upholding broad police powers to conduct investigatory or safety measures without any showing of a case-specific need for such measures. In the context of this case, however, such a "bright line," over-broad rule is unjustified. Some of the Court's decisions of this type were based on the government's strong need to routinely search or seize even in the absence of individualized suspicion. *See, e.g., Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990); *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989); *South Dakota v. Opperman*, 428 U.S. 364 (1976). There is no analogous need for routine custodial arrest in cases of non-jailable crimes. Other decisions were based on the difficulties which the police and courts would have in making and evaluating case-specific assessments of the need to search, exigent circumstances, etc. *See, e.g., United States v. Robinson*, 414 U.S. 218 (1973). In Petitioner's case, and in most cases like it, the need for custodial

A citation instructs the violator to appear in court on or by a particular date, and specifies the penalties for the offense and for failure to respond to the citation. Citations are a widely used and highly effective method of ensuring that minor offenders pay the penalties associated with their offenses. Citations have also been shown to be a highly effective deterrent. See, e.g., James M. McMahon, *New York State Takes the Next Step in Saving Lives*, The Police Chief, July 2000, at 34-39 (vigorous enforcement by police using citations has significantly increased seat belt compliance in New York State).

Custodial arrest is needed only when it could further an investigation, prevent some serious harm, or ensure the violator's appearance in court. Amici believe that such legitimate needs rarely exist in cases involving minor, non-jailable offenses. Most of these suspects, and almost all traffic offenders, can be fully identified from drivers license and/or vehicle records, and thus are unlikely to permanently evade justice. No further evidence-gathering is usually required; the investigation is complete at the scene. Nor, in most cases, is there any reason to fear imminent harm to anyone, immediate resumption of the offense, or failure to appear in court. Logic also tells us that minor traffic offenders are unlikely

---

arrest will rarely be present, and can be easily assessed on a case-by-case basis (as is demonstrated by the numerous model standards and state laws providing for such case-specific assessments, *see* Parts III and IV below). Finally, some broad police-powers decisions were based on the limited nature of the intrusions or privacy interests involved. *See, e.g., New York v. Burger*, 482 U.S. 691 (1987); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). As was shown in Part A above, custodial arrest is *not* a brief or relatively minor intrusion.

to flee the community to avoid paying a fine. Thus, not only in this case but in most cases of non-jailable misdemeanors, the alternative of issuing a citation fully meets all legitimate government interests in ensuring effective enforcement of the law.

In most non-jailable misdemeanor cases, a custodial arrest serves only one purpose: to impose unofficial "punishment" on offenders who cannot legally be sentenced to incarceration. Patrick G. Jackson, *Competing Ideologies of Jail Confinement*, *in* American Jails: Public Policy Issues 30 (J.A. Thompson & G.L. Mays eds., 1991). This is a flagrant abuse of the arrest power.

C. Not Only Does Arresting an Individual for a Non-Jailable Misdemeanor Offense Typically Serve No Legitimate Law Enforcement Purpose, Such an Arrest Actually Contradicts Law Enforcement Interests

Subjecting a minor traffic violator to a custodial arrest is not only unnecessary, it actually creates more serious problems for law enforcement. Short-term detainees such as Ms. Atwater cause significant management problems for jail administrators. They also burden the courts and magistrates with additional workload in the hours immediately following arrest. Moreover, arrests such as this remove the arresting officer from patrol duty, thus compromising public safety, and reduce the public's confidence in the law enforcement community. These problems must be taken into account in any balancing test of the reasonableness of the arrest.

1. Custodial Arrests of Non-Jailable Misdemeanants Present Serious Management Problems for Jail Officials and Produce Bottlenecks in the Booking Areas of Jails Which Are Costly, Dangerous, and Staff-Intensive

Jail managers and those who study jail operations have long known that short-term detainees place the most significant strain on the jail's resources. As noted above, every detainee must be booked, searched, photographed, and fingerprinted, and extensive paperwork must be completed. The American Jail Association's training course on intake procedures includes a checklist of more than 350 tasks to be completed during the intake process. *See* Thomas Rosazza, *Jail Intake: Managing a Critical Function; Part Two: Intake Task Analysis*, American Jails, May/June, 1999, at 112-116. These administrative tasks can be time-consuming and staff-intensive. In larger jail facilities, the sheer numbers of individuals brought to the jail can result in processing delays of up to 48 hours.[8] High inmate turnover increases these administrative costs and processing delays. Richard S. Frase, *Jails, in* Handbook of Crime & Punishment 482, 493 (Michael Tonry ed., 1998).

Crowding in the booking areas of jails and lockups is exacerbated by the all-too-frequent problem of crowding in permanent housing areas in jails. Put simply, there is sometimes no place to move arrestees whose paperwork has already been processed. This is called the "booking

[8] In a jurisdiction with no evening or weekend magistrate, a person arrested on a Friday evening for a non-jailable offense may well spend over 65 hours in jail prior to their first court appearance.

bottleneck." Booking areas of jails are ill-equipped in most cases to handle significant numbers of inmates. Large numbers are confined in group cells that are poorly ventilated and have exposed toilets. As noted above, the risk of assault, suicide, and spread of infectious diseases in booking areas is uncomfortably high, and affects both staff and detainees. Any minor misdemeanant brought to the booking area simply aggravates the crowding problem and escalates the risks involved, by burdening staff with additional administrative tasks and diverting them away from critical tasks such as monitoring suicide and assault risks.

A 1984 National Institute of Justice study showed that law enforcement policies, such as decisions to crackdown on particular offenses, can have immediate and significant impacts on jail populations and thus on jail conditions. *See* National Institute of Justice, *Jailing Drunk Drivers: Impact on the Criminal Justice System*, Washington D.C. (1984).[9] In a jurisdiction with a crowded jail or lockup facility, this can mean even more rapid deterioration of the facility. *See* G. Larry Mays and Joel A. Thompson, *The Political and Organizational Context of American Jails, in* American Jails: Public Policy Issues 15 (J.A. Thompson & G.L. Mays eds., 1991).

In sum, there are exceptional management problems associated with arresting these high-turnover inmates.

[9] Amici do not challenge the practice of arresting drunk drivers because these are usually jailable offenses, and there are typically significant law enforcement interests supporting the arrest (e.g., the need to prevent further impaired driving, and to collect reliable blood or breath samples). The research in this field is nevertheless useful because it documents the connection between law enforcement practices and jail population.

Correctional professionals accordingly discourage the practice of arresting misdemeanor offenders, and encourage a reduction in the number of transient inmates brought to the jail.

A ruling by this Court supporting the power of police to subject fine-only traffic offenders to a full custodial arrest could have major implications for jail managers, by increasing the number of transient inmates brought to jails around the country. This includes not only small rural municipal lockups, such as the one involved in this case, but large metropolitan jails as well. As a result, administrative costs would increase, and the ability of jail managers to protect arrestees would be hampered. Amici would predict a significant increase in the number of suicides, assaults, mental health problems, and inmates with communicable diseases, and an increase in lawsuits against jail managers, other officials, and local governments.

2. Custodial Arrests in Non-Jailable Misdemeanor Cases Burden Courts, Magistrates, and Pre-Trial Release Programs

Most jurisdictions have implemented a variety of programs and methods to assist in reducing the number of minor, low-risk detainees held in the jail. In addition to citation release by the police, techniques include recognizance and other pre-trial release programs; bail reform measures allowing for easier-to-meet financial conditions; added availability of judges during evenings and weekends; and earlier prosecutorial screening, to give just a few examples. National Institute of Justice, *Alleviating Jail Crowding: A Systems Perspective* (1985). These programs are traditionally managed by court personnel. Use of

these programs can reduce the time an arrestee charged with a misdemeanor spends in jail to only a few hours.

However, whenever an arrestee is processed through the jail prior to release, even if that release comes quickly, the resources of the courts are tapped. For each detainee not released directly by the police, a magistrate will review the case and make bonding and other release decisions. In most jurisdictions, a pretrial service officer will also be involved at this early stage, and valuable staff time will be diverted from more important cases. Most jurisdictions already have overworked court officials and overly long dockets for magistrates. These administrators can ill-afford the additional burden that comes from having to process minor traffic offenders as well.

3. Arresting An Individual for a Fine-Only Traffic Offense Is Contrary to Law Enforcement Interests Because It Removes an Officer from His or Her Duty Station and Negatively Affects the Public's Perception of the Police

In balancing the state's interest in making an arrest against the individual's interest in avoiding arrest, countervailing law enforcement concerns counsel against making an arrest and thus reduce the strength of the government interest. Whenever an officer makes a full custodial arrest, he or she must transport the individual to the booking location, and must complete a significant amount of paperwork. This process removes the officer from patrol duty for up to several hours.[10] As a result,

---

[10] Moreover, the arrest may lead either to increased overtime costs for the department or to an officer's missing a

fewer officers are available to handle law enforcement duties and to deal with emergencies. Public safety may be compromised. In other words, the importance of making an arrest must also be balanced against the importance of the officer's remaining on patrol duty. For fine-only traffic offenders and other misdemeanants charged with non-jailable offenses, the weighting of those factors clearly tips in favor of issuing a citation in lieu of arrest except in very unusual circumstances.[11]

Moreover, when police abuse their discretion by making inappropriate arrest decisions, it has significant implications for public relations and public support for law enforcement activities. Ordinary citizens begin to fear the police rather than respect their professionalism, and

---

shift due to required court appearances the day following an arrest. Either of these possibilities contradicts law enforcement interests, and is easily avoided by the issuance of a citation.

[11] Although many police chiefs would respond to an officer's abuse of discretion in such cases through administrative means (*e.g.*, disciplinary proceedings or warnings), that alone is insufficient to protect citizens from harmful, unnecessary arrests. In the first place, some law enforcement departments may not be sufficiently professional, and citizens need protection from these departments even more than from well-managed ones. Second, officers sometimes get mixed messages from their superiors; they are simultaneously told to cite traffic violators but also to find as much contraband as possible. The officer therefore arrests traffic violators to search cars and perhaps find illicit drugs. Of course, if contraband is found, the decision to arrest seems reasonable in retrospect. Finally, the reality is that police executives cannot always control the ground-level decisions of their officers. Therefore, it cannot be left solely to police departments to sanction officers for making inappropriate arrest decisions that hurt law enforcement interests.

this affects the ability of police to do their work, not to mention the quality of life in a community.

4. When a Custodial Arrest Results in Significant and Avoidable Problems for the Government, the Government's Interest in Making the Arrest Is Severely Weakened

Whatever the arresting officer's interest purports to be when arresting an individual for a non-jailable traffic offense, it must be counter-balanced by the significant problems that this practice creates for jail managers – who are also government officials – and for police and court administration interests generally. These problems are entirely avoidable if officers simply use the long-standing, effective, and widely accepted practice of citation release for misdemeanor traffic violations.

Amici are deeply concerned about the potential for any ruling that widens the net for minor offenders who can be brought to a jail by police officers. The police practice at issue in this case also shows a lack of concern for jail staff, who have no control over the individuals brought to the jail, who are required to conduct unnecessary and degrading searches of these individuals, and who are placed at risk by the additional crowding caused by these unnecessary arrests. Such arrests also weaken the public's confidence in law enforcement. In sum, amici believe that the government's overall interest in this case is entirely consistent with the interest of the traffic violator in not being arrested.

II. A Custodial Arrest for a Non-Jailable Misdemeanor Offense Violates the Proportionality Principle of the Fourth Amendment

The proportionality principle of the Fourth Amendment bars the use of intrusive measures in minor cases.

This principle is reflected not only in this Court's decisions, but also in common law rules; it thus pre-dates the Court's recent "balancing" approach to Fourth Amendment issues, and represents a distinct basis for finding a search or seizure to be unreasonable. Moreover, because the proportionality principle focuses primarily on the serious nature of the intrusion and the minor nature of the crime, it bars the use of certain measures even when the police have probable cause, and even if police inability to use such measures may prevent prosecution and conviction of the offender.

At common law, misdemeanor arrests were prohibited unless the offense was committed in the officer's presence, and involved an actual or threatened breach of the peace. *See Carroll v. United States* 267 U.S. 132, 156 (1925) (quoting *Halsbury's Laws of England*, vol. 9, part III, at 612). A breach of the peace typically meant a violent or destructive act, *see* Horace Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 572-77 (1923-24), and would not include minor regulatory violations such as the seat belt offense at issue in this case. These common law arrest limitations strongly support the proportionality principle embodied in the decisions of this Court discussed below, that intrusive police measures – including custodial arrest – cannot be used to enforce minor crimes. Indeed, the custodial arrest in this case is even more disproportionate than the arrests prohibited at common law, because many of the latter involved more serious, jailable offenses.

In *Welsh v. Wisconsin*, 466 U.S. 740 (1984), this Court held that the police could not make a warrantless entry of a person's house to effect an arrest for a non-jailable, civil offense of drunk driving, even though the officers had probable cause to arrest, and despite a very plausible

claim that delaying the arrest until a warrant was obtained would have resulted in the loss of crucial evidence of intoxication. The Court noted that many lower courts have viewed the seriousness of the offense as an important factor in assessing the reasonableness of a warrantless entry on exigent circumstances; the Court also cited Justice Jackson's view that warrantless entry to arrest for a minor offense would display "a shocking lack of all sense of proportion." *Id.* at 751 (citing *McDonald v. United States* 335 U.S. 451, 459 (1948) (Justice Jackson) (concurring)). Although drunk driving poses major risks to persons and property, the Court considered the legislative classification of these violations as non-jailable, civil offenses to be the best indication of the extent of the state's interest in making an arrest and enforcing this law. *Id.* at 754.

Petitioner's case is a much stronger vehicle than *Welsh* for applying the proportionality standard of the Fourth Amendment, because it involved a highly intrusive full-custody arrest, and a seat belt violation that carried less risk of public harm than drunk driving, a lower authorized fine, and no potential loss of evidence.

In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court held that police may not employ deadly force to arrest a fleeing, unarmed suspect who is not reasonably believed to pose a significant threat of death or serious physical injury to the officer or others. Recognizing that such a rule might permit some suspects to escape and perhaps even permanently evade capture and prosecution, the Court nevertheless concluded that the use of deadly force to arrest a suspect not believed to be dangerous or to have committed a violent crime would constitute an unreasonable seizure under the Fourth Amendment.

Thus, as in *Welsh*, the Court implicitly recognized that the Fourth Amendment reasonableness standard incorporates a requirement of proportionality between the intrusiveness of the arrest and the seriousness of the offense or offender.

Admittedly, a full-custody arrest is much less intrusive than the use of deadly force. However, the government's interest in making such an arrest for a non-jailable traffic offense is also far less than was the government's interest in apprehending and prosecuting the burglary suspect in *Garner*. Moreover, unlike the situation in *Garner*, limiting police power to make full-custody arrests for non-jailable offenses will have little adverse effect on the enforcement of such crimes, because most minor offenders, and almost all traffic offenders, can be fully identified from drivers' license and/or vehicle records, and thus are unlikely to permanently evade justice.

Several other decisions of this Court have also recognized the principle that police powers are more limited in minor cases. In *Graham v. Connor*, 490 U.S. 386 (1989), the Court held that the severity of the crime is one of three factors to be considered in assessing a claim that excessive force – deadly or non-deadly – was used to make an arrest. And in *United States v. Hensley*, 469 U.S. 221, 229 (1985), the Court suggested (but did not decide) that completed crimes less serious than the felony at issue in that case might not permit the use of *Terry* stop-and-frisk powers. Finally, numerous decisions of lower courts, in a variety of contexts, have considered the seriousness of the offense to be an important factor in determining issues of Fourth Amendment reasonableness, particularly with regard to the use of intrusive police powers. *See* William Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations – Warrantless Entries into Premises: The Legacy of Welsh v. Wisconsin*, 38 U. Kan. L. Rev. 439, 444, n. 26 (1990).

Taken together, the decisions summarized above demonstrate an important principle: even where the police have probable cause, an arrest may be found to be unreasonable when it involves intrusive police measures that are disproportional to the seriousness of the offense. When, as in this case, the state has declared that an offense is not punishable with incarceration, the use of custodial measures prior to trial is clearly disproportionate to the state's determination of the seriousness of the offense. Therefore, such arrests violate the Fourth Amendment in all but the exceptional case.

III. Model Standards Promulgated by Prominent National Entities Require Police Officers to Issue Citations in Lieu of Arrest for All Misdemeanor Offenses Absent Exceptional Circumstances

Some of the most prominent national associations dealing with administration of justice issues have issued model standards governing the use of citation release. Each organization's standards require or recommend that police officers issue citations in lieu of arrest in most misdemeanor cases, and specific exceptions guide the officer's discretion in those rare cases when an arrest would be appropriate. Those exceptions include when an arrest would further a legitimate investigative need, when an arrest is necessary to avoid imminent bodily harm, or when the officer reasonably believes that an accused will refuse to respond to a citation. These are reasonable and appropriate exceptions that adequately address legitimate law enforcement interests and provide

police with sufficient flexibility to respond to case-specific circumstances.

The American Bar Association's standards set forth a policy strongly favoring citation release whenever possible:

> It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.

American Bar Association, *Standards for Criminal Justice*, § 10.2-1 (2d ed., 1980). The accompanying commentary notes that no substantive change was intended from the standard previously in force, which provided:

> A law enforcement officer having grounds for making an arrest should take the accused into custody or, having already done so, detain him further only when such action is required by the need to carry out legitimate investigative functions, to protect the accused or others where his continued liberty would constitute a risk of immediate harm or when there are reasonable grounds to believe that the accused will refuse to respond to a citation.

Id., History of Standard (quoting American Bar Association, *Standards Relating to Pretrial Release*, Standard 2.1 (1968)). The commentary explains that the purpose of this standard is to avoid a period of "wholly unnecessary incarceration" when possible. American Bar Association, *Standards for Criminal Justice*, Commentary, § 10.2-1 (2d ed., 1980). The commentary continues:

> [Standard 10-2.1] requires jurisdictions to establish a policy favoring citation release in all cases in which such release is not inconsistent with

> other legitimate law enforcement objectives. This policy is consistent with most other national standards, which recommend that jurisdictions use citations to the maximum extent possible. . . . [A]rrest ought not to be the automatic response to every criminal law violation. When arrest serves no legitimate purpose, police ought to be authorized – and in clear cases required – to utilize the less restrictive alternative of citation release. *Id.*

Whereas Standard 10-2.1 encourages citation use in general, Standard 10-2.2, entitled "Mandatory Issuance of Citation," is directed to police officers, and focuses on misdemeanor cases. It states in relevant part:

> (a) Except as provided in paragraph (c), a police officer who has grounds to arrest a person for a misdemeanor should be required to issue a citation in lieu of arrest or, if an arrest has been made, to issue a citation in lieu of taking the accused to the police station or to court.
>
> . . .
>
> (c) The requirement to issue a citation . . . need not apply and the defendant may be detained:
>
> (i) when an accused subject to lawful arrest fails to identify himself or herself satisfactorily;
>
> (ii) when an accused refuses to sign the citation after the officer explains to the accused that the citation does not constitute an admission of guilt and represents only the accused's promise to appear;
>
> (iii) when an otherwise lawful arrest or detention is necessary to prevent imminent bodily harm to the accused or to another;
>
> (iv) when the accused has no ties to the jurisdiction reasonably sufficient to assure

> accused's appearance and there is a substantial likelihood that the accused will refuse to respond to a citation; or
>
> (v) when the accused previously has intentionally failed to appear without just cause in response to a citation, summons, or other legal process for an offense other than a minor one, such as a parking violation.

Id., Standard 10-2.2.

Commentary following this standard observes that:

> for many defendants, arrest involves a needless and wasteful invasion of personal freedom. . . . [T]he decision concerning the necessity for arrest should not be left to the untrammeled discretion of the arresting officer. A standard that permits officers to arrest or not according to their personal assessment of a defendant is bound to lead to unequal enforcement of the laws.

American Bar Association, *Standards for Criminal Justice*, Commentary, § 10.2-2 (2d ed., 1980).

Standard 10-2.2 applies to *all* misdemeanors, even those punishable by over six months in jail. As the commentary observes, "[t]he penalties for misdemeanors are not so severe that a large number of defendants will be motivated to flee in order to avoid them, and the acts punished are not so serious that the public safety demands immediate incarceration." *Id.* The standard and its rationale apply with even more force to a case such as Petitioner's: a non-jailable traffic offense with a maximum penalty of a $50 fine.

Other prominent organizations have also written model standards supporting mandatory citation in most minor cases. The American Law Institute's Model Code of

Pre-Arraignment Procedure calls for issuance of regulations "designed to provide the maximum use of citations, so that persons believed to have committed offenses will be taken into custody only when necessary in the public interest." American Law Institute, *Model Code of Pre-Arraignment Procedure*, § 120.2(4) (1975).

The Uniform Rules of Criminal Procedure require citation release for all offenses in the absence of disqualifying conditions. National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Criminal Procedure*, Rule 211(c). Arrest is permitted only when the offense involves violence or a risk of bodily injury; the offense is being committed in the officer's presence and the person will deliberately continue committing the offense unless arrested; the offense is punishable by incarceration and the person would not respond to a citation; or when arrest is necessary for protection of the arrestee or to obtain medical aid. *Id.*, Rules 211(c) (1)-(4) (1974).

The National Prosecution Standards of the National District Attorneys Association call for mandatory issuance of citations in lieu of arrest in all minor cases, with limited exceptions similar to those found in the ABA Standards. *See* National District Attorneys Association, *National Prosecution Standards*, § 10.2(B) (1977); American Bar Association, *supra*, Standard 10-2.2. The NDAA Standards go on to state that "[e]ach law enforcement agency should promulgate regulations designed to increase the use of citations to the greatest degree consistent with public safety." National Prosecution Standards, *supra*, § 10.2(C)(2).

Standards issued by the National Association of Pretrial Services Agencies (NAPSA) similarly indicate that

an officer should be required to issue a citation in lieu of arrest to all persons charged with misdemeanors unless certain circumstances exist. Those circumstances include most of the previously articulated exceptions, along with an exception for "legitimate investigative action." National Association of Pretrial Services Agencies, *Performance Standards and Goals for Pretrial Release and Diversion: Pretrial Release*, Standard II.A (1978). The accompanying commentary notes that citation release benefits "both the accused and the criminal justice system" and that "[c]osts to the jurisdiction are reduced in that no additional personnel are required to effect release and the police officer's time out of service is minimized by avoiding the need to transport the arrestee to a central booking facility." *Id.*, Commentary at 11.

Finally, the model standards adopted by the National Advisory Commission on Criminal Justice Standards and Goals (NAC), a commission appointed by Attorney General John Mitchell in 1973, are similar to those of NAPSA. The NAC standards urge jurisdictions to adopt immediately policies requiring citation in lieu of arrest in minor cases, absent specified circumstances. National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, Standard 4.3 (1973).

For each of the above-discussed model standards, law enforcement interests were well-represented at the drafting table. Each committee that prepared the standards included prosecutors, as well as representatives from the police, sheriffs departments, and associations representing law enforcement interests, among their membership or on Advisory Committees, Task Forces, or review groups.

In summary, these model standards demonstrate that citation release is the appropriate law enforcement response in misdemeanor cases, absent any exceptional circumstances. The exceptions that have been carved out by these model standards are entirely reasonable and adequately serve all legitimate law enforcement interests. Moreover, the existence of these long-standing model standards makes clear that channeling a police officer's discretion in these ways is workable and causes no threat to law enforcement.

IV. Amici Urge This Court to Adopt a Rule Barring Custodial Arrest Absent Exceptional Circumstances in All Non-Jailable Misdemeanor Cases, in Keeping With the Model Standards, Workable Laws in Many States, and Good Police Practice

The model standards cited above offer excellent guidance to this Court. They have been in place for three decades without challenge or need for significant revision. They are thoughtful, workable standards – drafted with the input of law enforcement representatives – that meet the legitimate needs of law enforcement officials while respecting the rights of all citizens to be free from unreasonable arrests.

The exceptions set forth in the standards strike an appropriate balance between the rights of individuals and law enforcement interests. The policy in favor of citation in lieu of arrest is qualified by exceptions allowing for arrest in cases when there is a legitimate investigative need, a need to avoid imminent harm, or a substantial risk that the individual will not respond to a citation. Such legitimate law enforcement interests should be respected.

This Court need not attempt to specify all the exceptional circumstances that could justify a custodial arrest in a non-jailable misdemeanor case. It would be sufficient to rule that there may not be a custodial arrest in non-jailable misdemeanor cases absent exceptional circumstances, and that no such circumstances existed in this case. Lower courts can decide whether "exceptional circumstances" exist in future cases coming before them.

A ruling by this Court along these lines would strike a middle ground between allowing untrammeled police discretion and removing all police flexibility to deal with case-specific circumstances. If this clear standard is put in place, there would be no further need for a complicated balancing test with regard to these minor offenses.

Amici also do not believe that the Court should limit its ruling to traffic offenses. The standard adopted should apply to *all* non-jailable misdemeanor cases.[12] Of course, the need to apply such a rule in fine-only traffic offenses is even more compelling.

Several states already have arrest limitations at least as restrictive as those proposed here. Experience in these states shows that the limitations are reasonable and workable. In Minnesota, for example, the police have been required since 1975 to issue a citation in all misdemeanor cases with a maximum penalty of 90 days in jail or less "unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct, or that there is a substantial likelihood that the accused will

---

[12] The proposed standard is less strong than the standards set forth in the models cited, many of which apply the policy to all misdemeanor cases carrying sentences of less than six months in jail. The Court may choose to adopt this broader approach instead.

fail to respond to a citation." Minn.R.Crim.P., Rule 6.01, subd. 1 (1999). The Rule's text and commentary indicate that arrest is almost never permitted for non-jailable misdemeanors. Moreover, these limits on the arrest power are enforced through exclusionary rules. *See State v. Martin*, 253 N.W.2d 404 (Minn. 1977) (non-jailable misdemeanors); *State v. Varnado*, 582 N.W.2d 886 (Minn. 1998) (misdemeanors). But, recognizing the fundamental proportionality principle discussed in Part II above, as well as the more frequent need for arrest in serious cases, the Minnesota rules grant much broader arrest powers for gross misdemeanor and felony crimes. Minn.R.Crim.P. Rule 6.01, subd. 2 (1999); *State v. Bauman*, 586 N.W.2d 416 (Minn. Ct. App. 1998) (gross misdemeanor charge, maximum penalty of one year in jail).

Other states also impose substantial limitations on arrest powers in minor cases.[13] Many states require issuance of a citation in lieu of arrest for most misdemeanor traffic violations. *See, e.g.*, Ind. Code § 9-30-2-5 (2000); Neb. Rev. Stat. § 60-684 (1999); N.M. Stat. Ann. § 66-8-123 (2000); S.D. Codified Laws Ann. § 32-33-2 (2000). A number of states also require citations for certain non-traffic offenses, *see, e.g.*, Alaska Stat. § 12.25.180(b) (1999) (infractions); Vt. R. Cr. P. 3(c) (1999) (misdemeanors). Moreover, standards adopted by numerous law enforcement agencies express a clear preference for the issuance

---

[13] The most recent national survey found a large number of states with statutes encouraging the use of citations for traffic and other minor offenses. *See* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L. Rev. 221, 251 n. 189 (1989) Additional limits are found in state rules of procedure (e.g., the Minnesota and Vermont Rules cited in text).

of citations in lieu of arrest in most misdemeanor cases. *See, e.g.*, North Carolina Highway Patrol Policy Manual, Directive 1.1, Section III.A (1999) (barring arrest for all infractions); *id.*, Section III.B (limiting the circumstances in which arrests can be made in misdemeanor cases).

The experience of these states shows that strict limitations on police powers to arrest for minor offenses are workable in practice and pose no threat to law enforcement's ability to protect public safety and enforce the law.

CONCLUSION

Whether this Court applies a test balancing the individual and government interests involved, or relies on the proportionality requirement of the Fourth Amendment, a custodial arrest for a non-jailable misdemeanor is unreasonable and unjustifiable absent exceptional circumstances. No such circumstances existed in this case.

A ruling in petitioners' favor would simply recognize existing good law enforcement practice around the country. In contrast, a ruling in respondents' favor could cause unintended difficulties for those who deal with the administration of justice, especially jail managers, pretrial service agencies, and the courts.

This Court should reverse the decision below, and announce a standard barring custodial arrest in all non-jailable misdemeanor cases absent exceptional circumstances that reflect legitimate law enforcement needs.

Respectfully submitted,

RICHARD S. FRASE
Counsel of Record
229 19th Avenue South
Minneapolis, Minnesota 55455
(612) 625-0831
Attorney for Amici Curiae

September 11, 2000

APPENDIX A:
INFORMATION ABOUT AMICI

Following are brief biographies of the individuals who have joined as amici in their individual capacities:

Dr. James Austin is the co-director of the Institute on Crime, Justice, and Corrections at the George Washington University in Washington, D.C. He has over 25 years of experience in criminal justice planning and research, and is one of the country's leading experts on correctional classification programs. He serves, or has recently served, as director for several large U.S. Department of Justice-funded research and evaluation programs. Some of his most recent studies have included national evaluations of "Three Strikes and You're Out" laws, the privatization of prisons, juveniles in adult corrections, and prison classification systems. He has also conducted evaluations of local jail systems (New York City, Los Angeles, Philadelphia, Chicago, and D.C.) and how they have been impacted by various law enforcement drug control programs.

David Bogard is an attorney with over 20 years of experience managing and advising on the operations of correctional facilities. He served as the Director of Corrections for Arlington County, Virginia from 1988 to 1994, and prior to that as Special Assistant to the Superintendent of the Philadelphia, Pennsylvania jail system. Mr. Bogard is a Commissioner on the Commission on Accreditation for Corrections of the American Correctional Association, where he reviews jail facilities nationwide to determine if they meet correctional standards. Mr. Bogard has also conducted jail management training for the

National Institute of Corrections-Jail Division, an arm of the United States Department of Justice. He has been an adjunct law professor at Howard University Law School. Mr. Bogard is currently a principal in the criminal justice planning firm of Pulitzer/Bogard and Associates, which consults on projects throughout the country dealing with jail operations and management.

James J. Fyfe is a Professor of criminal justice and senior public policy research fellow at Temple University, and is one of the nation's leading police scholars. Fyfe served as a New York City police officer, sergeant, and lieutenant during 1963-79, and held a variety of patrol, supervisory, training, and command positions. He was a Commissioner of the Commission on Accreditation for Law Enforcement Agencies, and helped to draft, review, and enforce that organization's standards. He has published five books and more than one hundred articles and chapters on police issues, and has testified as an expert on police issues in approximately 300 cases in state and federal courts in 33 states, the District of Columbia, and Canada, as well as in the U.S. Senate and House of Representatives, and in state and local legislatures across the U.S. Fyfe has consulted with police and law enforcement agencies throughout the world, and was a Senior Fellow of the Police Foundation, for which he drafted the amicus brief that was cited approvingly in the U.S. Supreme Court's majority decision in *Tennessee v. Garner*.

M. Kay Harris is an Associate Professor and former Chair of the Department of Criminal Justice at Temple University in Philadelphia. She is widely recognized as

one of the country's leading scholars on community corrections issues. Since 1991, she has worked with the City of Philadelphia and the local courts as a consultant in the federal court case dealing with overcrowding in the Philadelphia jail system. In the early 1970s, Professor Harris served as Assistant Director to the National Advisory Commission on Criminal Justice Standards and Goals (NAC), convened by Attorney General John Mitchell. In that position, she helped draft the NAC Standards on Corrections, including those standards dealing with citation release in lieu of arrest, which are of direct relevance in this case. She has also held positions with the American Bar Association, the Office of the United States Attorney General, the National Institute of Law Enforcement and Criminal Justice, and the Federal Bureau of Prisons. Professor Harris has provided technical assistance to corrections agencies throughout the United States, and has a long-standing commitment to helping criminal justice system stakeholders improve the administration of justice in their communities.

Alan Henry is Executive Director of the Pretrial Services Resource Center, a position he has held since 1984, and is widely considered the country's foremost expert on pretrial services programs. The Center is the national clearinghouse for information about pretrial laws, research, and program practices, and was established with funding from the United States Department of Justice in 1976. Besides directing the ongoing projects of the Center, Mr. Henry is a member of the American Bar Association's Task Force on Pretrial Release, serves on the Research Feedback Group of the International Association of Chiefs of Police, and chaired the Ad-Hoc Pretrial

Release Committee of the American Correctional Association. He has also served on the Board of Directors for the National Association of Pretrial Services Agencies (NAPSA), which drafted standards dealing with citation release in lieu of arrest. Those standards are of direct relevance in this case. Mr. Henry has conducted numerous training programs, and has helped the National Institute of Corrections develop training materials and provide technical assistance on jail overcrowding. The National Criminal Justice Association honored him for his "Outstanding Contribution to the Field of Court Administration" in 1986, and he continues to use his expertise to improve the administration of justice in the courtroom and in jails.

Michael Jacobson, Ph.D., was the New York City Corrections Commissioner from 1995 to 1997 and was the New York City Commissioner of Probation from 1992 to 1996. Before being appointed Probation Commissioner, he worked for nine years at the City Office of Management and Budget, where he was a Deputy Budget Director. He is currently a professor of sociology and criminology at the Graduate Center of the City University of New York and the John Jay College of Criminal Justice. Professor Jacobson also was an adjunct assistant professor at the Wagner School at NYU from 1985 to 1997 teaching courses on governmental budgeting, public policy analysis and organization theory.

Kenneth Kerle, Ph.D., has been the managing editor of the American Jail Association since 1986. He was asked to initiate the publication of American Jails magazine based on his experience in the field of corrections. His

book, "American Jails: Looking to the Future," (Butterworth-Heinemann, 1998) covers his jail odyssey to 48 states and visits to over 700 jails. Dr. Kerle has also visited over 150 prisons, jails, probation offices, police departments, and halfway houses in 20 foreign countries in Europe, Asia, and Australia. He has worked as a consultant to the National Sheriffs' Association (NSA), where he served as senior auditor of 66 jails in 20 states, producing full-length evaluation reports which measured jail operations policies and procedures against national accreditation guidelines. Dr. Kerle was also the co-author of the NSA publication "The State of Our Nation's Jails – 1982." He has written over 100 papers and articles about local corrections and lectures on the subject of jail in universities across the country.

Steve Martin is one of the country's leading experts on corrections litigation and correctional facility operations, with almost 30 years of experience working in the criminal justice system. An attorney and consultant, he is often called by the United States Department of Justice as an expert witness. He currently serves as a co-monitor for the federal court in the litigation involving Riker's Island in New York. Mr. Martin previously served as General Counsel to the Texas Department of Corrections and was the third-ranking official for that agency. He also previously worked as an Assistant District Attorney, a Special Assistant Attorney General in Texas, a U.S. Probation and Parole Officer, and a prison guard. Mr. Martin also held a gubernatorial appointment to the Texas Punishment Standards Commission, which revised the state's Penal Code and Code of Criminal Procedure.

Thomas Rosazza is an expert on police and correctional custodial care standards. The author of several training manuals, he has worked with such agencies as the American Correctional Association, the National Institute of Corrections, the American Medical Association Jail Standards Project, and Americans for Effective Law Enforcement. He conducts the American Jail Association's training course on jail intake procedures. Mr. Rosazza has held various positions in correctional administration, and has served as Assistant Executive Director of the Maryland Police and Correctional Training Commissions. There he began the development of the nation's first legislatively mandated training programs for state and local correctional personnel. He was also appointed Inspector General of Maryland's Commission on Correctional Standards, where he helped develop jail standards.

Eli B. Silverman, Ph. D, is Professor in the Department of Law, Police Science and Criminal Justice Administration at John Jay College of Criminal Justice, City University of New York. He has previously served with the U.S. Department of Justice and the National Academy of Public Administration in Washington, D. C. He has served as consultant to numerous criminal justice agencies, and has expertise in the areas of police management, community policing, and comparative policing. His numerous publications on policing include: *NYPD Battles Crime: Innovative Strategies in Policing*, Northeastern University Press, 1999; "Reigning in the Police," *Criminal Justice Ethics*, Vol. 17, No. 2, Summer/Fall 1998; "The NYPD's New Strategies," with Paul O'Connell in *Crime and Justice in New York City*, Andrew Karmen, ed., McGraw Hill, 1998; "Below Zero Tolerance: The New

York Experience," in *Zero Tolerance Policing*, Roger Hopkins Burke, ed., Perpetuity Press, 1998; "Crime in New York: A Success Story," *The Public Perspective*, Vol. 8, No. 4, June/July 1997; and "Revolutionizing the Police: Fighting Crime in New York City," with Paul O'Connell, *Security Journal*, 9, 1997.

Arthur Wallenstein is the Director of the Montgomery County (Maryland) Department of Corrections and Rehabilitation. He previously served for 9 years as the Director and Jail Administrator of the King County (Washington) Department of Adult Detention, and for 13 years as Warden/Director of the Bucks County (Pennsylvania) Department of Corrections. Widely respected for his professionalism and knowledge about jail operations, Mr. Wallenstein was honored with the "Jail Administrator of the Year" Award by the American Jail Association in 1988. Mr. Wallenstein has also served on the National Institute of Corrections Advisory Board since 1994, and previously chaired the Board's Jails Committee. He has a particular interest in issues involving jail intake, mental illness, and health care, and is deeply concerned with the management problems caused by transient inmates.